

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2019-185-E and 2019-186-E

South Carolina Energy Freedom Act (H.3659))
 Proceeding to Establish Duke Energy)
 Carolinas, LLC's Standard Offer, Avoided)
 Cost Methodologies, Form Contract Power)
 Purchase Agreements, Commitment to Sell)
 Forms, and any other Terms or Conditions)
 Necessary (Includes Small Power Producers as)
 Defined in 16 United States Code 796, as)
 Amended) – S.C. Code Ann. Section 58-41-)
 20(A) – 2019-185-E)

and)

South Carolina Energy Freedom Act (H.3659))
 Proceeding to Establish Duke Energy)
 Progress, LLC's Standard Offer, Avoided)
 Cost Methodologies, Form Contract Power)
 Purchase Agreements, Commitment to Sell)
 Forms, and any other Terms or Conditions)
 Necessary (Includes Small Power Producers as)
 Defined in 16 United States Code 796, as)
 Amended) – S.C. Code Ann. Section 58-41-)
 20(A) – 2019-186-E)

PETITION OF

DUKE ENERGY CAROLINAS, LLC

AND

DUKE ENERGY PROGRESS, LLC

FOR RECONSIDERATION

OF ORDER NO. 2019-881(A)

Introduction

Pursuant to S.C. Code Ann. §§ 1-23-380, 58-27-2150 and 10 S.C. Code Ann. Regs. 103-825(A)(4) and applicable South Carolina law, Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP” and, together with DEC, the “Companies” or “Duke”) hereby submit their petition (“Petition”) to the Public Service Commission of South Carolina (“Commission”) requesting that the Commission reconsider its ruling in Order No. 2019-881(A) (“the Order”). In the Petition the Companies ask the Commission to address two matters: (A) the

Companies' concerns and objections to the report ("Power Advisory Report" or "Report") submitted by Power Advisory LLC, the third-party consultant retained by the Commission to provide it advice in these proceedings; and (B) a discrepancy in the avoided capacity rate for DEC that resulted from a correction made by Office of Regulatory Staff ("ORS") witness Brian Horii on the witness stand.

Grounds for Reconsideration

A. Sections 4.1.1, 4.1.3, 4.4.1, and 4.4.2 of the Power Advisory Report Should be Stricken as Contrary to Law and the Commission Should Modify the Order so as not to Rely Upon any of These Provisions of the Power Advisory Report as not Properly Based Upon Evidence in the Record in These Proceedings.

1. In their November 8, 2019 response to the Power Advisory Report, DEC and DEP raised issues concerning procedural problems with the Report. Those issues were not addressed in the Order but are important, not only to this record, but because this is the first proceeding in which the Commission retained and relied upon a third-party advisor as permitted by Act 62 of 2019 ("Act 62"). The Companies submit this Petition seeking a ruling on the issues they raised in the November 8, 2019 response to the Report.

2. Power Advisory's statutory role in this proceeding, as established in Act 62, is to provide the Commission with an independent third-party assessment of Duke's avoided cost rates, methodologies, terms, calculations, and conditions and "to inform the Commission's decision setting the avoided costs for each electrical utility." *See* S.C. Code. Ann. § 58-41-20(I).

3. Act 62 directs the Commission to engage "a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs." S.C. Code Ann. § 58-41-20(I). The statute specifically grants the third-party consultant the right to submit requests for documents and

information under the authority of the Commission and directs that “[t]he qualified independent third party’s duty will be to the commission.” *Id.* With respect to the Report, Act 62 directs that “[a]ny conclusions [of the consultant] based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility.” S.C. Code Ann. § 58-41-20(I) (emphasis added).

4. Act 62 also subjects the third-party consultant to the ex parte prohibitions contained in Chapter 3, Title 58. S.C. Code Ann. § 58-3-260 governs the conduct of communications between the Commission and parties:

(B) Except as otherwise provided herein or unless required for the disposition of ex parte matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

Subsection 58-3-260(C) exempts several categories of communication from the prohibitions of subsection B and specifically provides that commissioners, hearing officers, and commission employees may “receive aid from commission employees if the commission employees providing aid *do not . . . furnish, augment, diminish, or modify the evidence in the record.*” S.C. Code Ann. § 58-3-260(C)(8)(b) (emphasis added).

5. Four sections of the Power Advisory Report (4.1.1, 4.1.3, 4.4.1, and 4.4.2) introduce facts and information were not admitted into the evidentiary record of these proceedings. Because

these facts are not included in the evidentiary record, the Companies and other parties did not have an opportunity to properly review and analyze them in the same manner that is afforded to parties with respect to facts that are included in the evidentiary record. As such, the inclusion of this new information in the Power Advisory Report was a violation of Act 62 and S.C. Code Ann. §58-3-260(C)(6) and the Commission should order it stricken from the Report and not included in the record of this proceeding.

6. Section II.A. (pages 3-6) of Duke's November 8, 2019, Response to the Power Advisory Report identified for the Commission how the Power Advisory Report improperly introduced and relied upon information not in the evidentiary record. For the Commission's reference, Section 4.1.1. introduces information not in the evidentiary record in its discussion of the implications of 10-year contract lengths, at pages 34-36 of the Report, specifically including the information supported in footnotes 109, 112, and 113. Section 4.1.3 similarly introduce information not in the evidentiary record to compare PUPRA contract lengths with other States at pages 36-38, with Power Advisory citing in footnote 115 to its own independent investigation "based on various regulatory filings, Standard Offer PPAs and associated documents" to support Figure 5. Section 4.4.2 introduces Power Advisory's independent investigation of other jurisdictions' contracting procedures and approach to LEO formation at page 52-23. Section 4.4.2 introduces Power Advisory's "additional research on in-service requirements following LEO formation" at page 55, which similarly is not based upon evidence in the record. This information should not have been included in the Power Advisory Report and should not be included in the record of this proceeding.

7. Power Advisory's reliance on information not in the evidentiary record offends well-established standards under the South Carolina Administrative Procedures Act and the Commission's existing rules of practice and procedure. In a contested proceeding, the South

Carolina Administrative Procedures Act mandates that any information offered for inclusion into the record must be subject to objection and cross-examination and otherwise comply with the rules of evidence. *See* S.C. Code Ann. § 1-23-330. The Commission’s rules of practice and procedure also require that any evidence offered for admission into the record “shall be subject to appropriate and timely objection.” S.C. Code Regs. Ann. § 103-849. Assertions of fact and original analysis must be introduced in pre-filed testimony and exhibits and subject to cross-examination and discovery, in accordance with S.C. Code Regs. Ann. § 103-845. Because the Power Advisory Report included and relied on information that that did not meet these standards, that information should be stricken from the Report and not included in the record of this proceeding.

8. The inclusion in the Power Advisory Report of information that was not properly part of the record was a violation of procedural due process. Due process mandates that the parties have notice and an opportunity to be heard, and is protected by Article I, Section 22 of the South Carolina Constitution, which is applicable to administrative proceedings. The South Carolina Supreme Court has held that this provision applies the fundamental requirements of due process to administrative proceedings including, “notice, an opportunity to be heard in a meaningful way and judicial review.” *Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Moreover, in a quasi-judicial or adjudicatory proceeding, “the substantial rights of the parties must be preserved.” *Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). Because the Power Advisory Report included and relied on information that that did not meet these standards, that information should be stricken from the Report and not included in the record of this proceeding.

9. The Commission is also prohibited from relying upon information that Power Advisory has improperly introduced in its Report to “augment, diminish, or modify the evidence

in the record.” S.C. Code Ann. § 58-3-260(C)(8)(b). Duke’s review of the Order suggests that the Commission improperly relied upon such information at page 151 of the Order, where it weighs Power Advisory’s “additional research on in-service requirements following LEO¹ formation,” in determining whether the Companies’ Notice of Commitment Form may contain a 365 Day Commercial Operation date. Power Advisory’s “additional research” presented in Section 4.4.2 of the Report improperly introduces evidence of other states’ in-service requirements for LEO formation thereby “modif[y]ing the evidence in the record.” Accordingly, the Commission cannot rely upon this “additional research” in making its determinations regarding the Notice of Commitment Form.

10. To ensure compliance with Act 62, the South Carolina Administrative Procedures Act, the procedural due process protections of the South Carolina Constitution, the Commission should expressly make a determination that Sections 4.1.1, 4.1.3, 4.4.1, and 4.4.2 of the Power Advisory Report should be stricken as contrary to law and should modify the Order so as not to rely upon any of these provisions of the Power Advisory Report as not properly based upon evidence in the record in these proceedings.

B. The 10-year Avoided Capacity Rates Approved for DEC in Ordering Paragraph 3 are Based Upon a Computational Error in Calculating the CT Fixed Charge Rate and Should be Corrected.

11. In calculating the Companies’ avoided capacity rates, ORS witness Horii argued that DEC should increase its CT Fixed Charge Rate by assuming a 20-year economic life for the combustion turbine unit (“CT”) as opposed to the 35-year economic life proposed by Duke. Tr. Vol. II, at 525.13-14. At the hearing, ORS witness Horii made a correction to his pre-filed direct testimony and indicated that his proposal to adjust the CT economic life to 20 years for DEC

¹ Legally Enforceable Obligation (“LEO”).

“increased the CT Fixed Charge Rate from 7.635% per year to **9.831% per year**,” not 9.931% per year as initially presented in Mr. Horii’s pre-filed direct testimony. Tr. Vol. II, at 521; 525.14, ln. 3-5.

12. The Order initially relies upon ORS witness Horii’s corrected testimony reflecting the 9.831% Fixed Charge Rate and expresses the Commission’s intent to modify DEC’s avoided capacity rates to reflect the Fixed Charge Rate methodology “put forth by ORS witness Horii.” Order at 94, 101. However, the DEC avoided capacity rates ultimately approved by the Commission in Ordering Paragraph 3 are calculated based upon ORS witness Horii’s prior, uncorrected testimony and, therefore, reflect a computational error in the CT Fixed Charge Rate.² In applying the corrected Fixed Charge Rate, supported by Witness Horii and adopted by the Commission, the 10-year avoided capacity rate would be as follows:

10-Year Avoided Capacity Rates – Distribution (20 Year CT, \$/kWh)	Rates Approved in Ordering Paragraph 3 Using Fixed Charge Rate of 9.931%	Rates Using Witness Horii’s Corrected Fixed Charge Rate of 9.831%
Summer On-Peak	0.0330	0.0327
Winter AM On-Peak	0.0394	0.03.90
Winter PM On-Peak	0.0131	0.0130

13. Therefore, the Companies request the Commission correct DEC’s avoided capacity rates to reflect the corrected 9.831% Fixed Charge Rate supported by ORS witness Horii during the hearing.³

² To provide further explanation, this calculation is likely a result of the Commission adopting the Avoided Capacity rates sponsored by ORS Witness Horii in surrebuttal testimony, which were not updated to take into account the change in the Fixed Charge Rate, as corrected by Mr. Horii on the stand. See Tr. Vol. II, at 528.11

³ Through this limited reconsideration, Duke is seeking to ensure the avoided capacity rates to be implemented reflect the methodology approved by the Commission and supported by evidence in the record. For the avoidance of doubt, Duke continues to fully support the Companies’ methodology for calculating avoided capacity under the peaker methodology, and Duke’s decision not to seek rehearing and/or reconsideration of the Commission’s

Conclusion and Request for Relief

The Companies request that the Commission reconsider Order No. 2019-881(A) and issue an order (1) striking the portions of the Power Advisory Report that were included in it unlawfully as described in this Petition; and (2) making the correction to the DEC avoided capacity rate as outlined in this Petition.

Dated this 13th day of January, 2020.

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determination in Order No. 2019-881(A) in this regard does not constitute a waiver or abandonment of any such positions in future proceedings.